

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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5 Milavetz, Gallop & Milavetz,) Case No. 12-CV-875 (MJD/JJG)
6 P.A.,)
7 Plaintiff,)
8 vs.) St. Paul, Minnesota
9 Wells Fargo Bank, N.A.,) July 27, 2012
10 Defendant.) 9:31 a.m.
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12

13 BEFORE **THE HONORABLE JEANNE J. GRAHAM**
14 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

15

HEARING ON DEFENDANT'S MOTION FOR PARTIAL DISMISSAL

16

APPEARANCES:

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1 **P R O C E E D I N G S**2 **IN OPEN COURT**

3 THE COURT: We are here on the matter of Milavetz,
4 Gallop & Milavetz versus Wells Fargo, Civil File number
5 12-00875. This is assigned to Chief Judge Michael Davis,
6 and myself, Jeanne Graham, as Magistrate Judge. And we are
7 here today on a referral for Defendant's Motion for Partial
8 Dismissal.

9 Can I have appearances, please, first on the
10 Plaintiff's side?

11 MR. DOCHERTY: Your Honor, Michael Docherty
12 representing the Plaintiff.

13 THE COURT: Good morning. For the Defense?

14 MR. THOMSON: Your Honor, Richard Thomson
15 representing Wells Fargo. With me is my partner, Amy
16 Schwartz.

17 THE COURT: All right, very good. Well, we will
18 proceed with the Defendant's oral argument first, then we
19 will have a response, and then I will allow you to have a
20 brief reply if you need to. Go ahead.

21 MR. THOMSON: Thank you. May it please the Court?
22 Plaintiffs First Amended Complaint contains 15 counts. This
23 Motion for Partial Dismissal under Rule 12(b) (6) seeks the
24 dismissal of eight of those fifteen counts. Plaintiff
25 consents to the dismissal of five of those eight counts,

1 leaving three counts for the issues this morning, fraudulent
2 misrepresentation, conversion, and Minnesota's Deceptive
3 Trade Practices act.

4 This motion is simple. The law is clear. And I
5 will try to be as brief as I know how.

6 THE COURT: Okay.

7 MR. DOCHERTY: First fraudulent misrepresentation.
8 Plaintiff fails to state a claim for fraudulent
9 misrepresentation, because Plaintiff fails to allege the
10 necessary scienter by Wendy Little, Wells Fargo's employee,
11 who made the misrepresentation that is alleged here.

12 Let me first be clear that it is the scienter of
13 Wendy Little that matters, here, not any kind of collective
14 corporate scienter on the part of Wells Fargo. Plaintiff
15 alleges that when Wendy Little told Plaintiff that the fake
16 check had cleared, Wendy Little could have looked into Wells
17 Fargo's corporate records and seen that in fact the fake
18 check had been returned.

19 Plaintiff wants to impute that knowledge that
20 Wells Fargo as some corporate entity had to Wendy Little, so
21 that it could be said that she knew at the time of her
22 representation that her representation was false. But, the
23 law is clear that there is no collective corporate scienter.
24 There has to be at least one individual person who by
25 herself possesses the requisite scienter.

1 I know it is bad form at oral argument to cite
2 cases, but it might save the Court some legal research time
3 if I do. The two recent cases in Minnesota holding that
4 there is no collective corporate scienter and that what is
5 relevant is the subjective state of mind of the individual
6 are *Cummings versus Paramount Pictures*, which is at 715
7 F.Supp. Second 880, and in particular page 906. And also,
8 *In re: Medtronic Inc. Securities Litigation*, which is at
9 618 F.Supp. 2d 1016, at page 1035. Both of these are
10 decisions from 2010 from the District of Minnesota.

11 Now, two of --

12 THE COURT: And was that in your reply? I can't
13 remember.

14 MR. THOMSON: We did not --

15 THE COURT: Okay.

16 MR. THOMSON: -- cite those cases in our reply.
17 The reason I mention them today is that we have had the
18 luxury of some time between --

19 THE COURT: Sure.

20 MR. THOMSON: -- submitting the written pleadings
21 and papers. And as I looked at Plaintiff's Response Brief I
22 thought maybe --

23 THE COURT: Okay.

24 MR. THOMSON: -- there might be some confusion.
25 So I wanted to clear up that point, in particular.

1 THE COURT: Okay.

2 MR. THOMSON: To allege the scienter that is
3 required for fraudulent misrepresentation, you have to
4 allege one of three things. First, you can allege that the
5 misrepresenter knows or believes that the matter is not as
6 he or she represents it to be. Nowhere does Plaintiff's
7 Complaint allege that Wendy Little knew or believed her
8 representation was false.

9 Second, you can allege that the misrepresenter
10 spoke positively and without qualification, but was
11 conscious that she was ignorant of the real truth. Nowhere
12 does Plaintiff's Complaint allege that Wendy Little knew
13 that she was ignorant of the real truth when she made her
14 representation.

15 Third, you can allege that the misrepresenter
16 realized that the information on which she relied was not
17 adequate or dependable, but nevertheless made her positive
18 and unqualified assertion. Nowhere does Plaintiff's
19 Complaint allege that Wendy Little realized that the
20 information on which she relied was inadequate or
21 undependable.

22 Now, if Plaintiff wants to state a claim for
23 fraudulent misrepresentation, Plaintiff needs to amend its
24 Complaint to make the necessary allegations. If Plaintiff
25 is willing to undertake the litigation risks and

1 responsibilities of making that allegation, and if Plaintiff
2 believes it has a good faith Rule 11 basis to make one of
3 those allegations.

4 But, as it stands now, Plaintiff has alleged only
5 that Wendy Little could have gained knowledge of the true
6 facts if only she had looked into the information that
7 allegedly was reasonably available to her at Wells Fargo.
8 That is a classic allegation of negligence. Negligence is a
9 far cry from fraudulent misrepresentations.

10 The people in China who perpetrated this Nigerian
11 check scam, they committed fraudulent misrepresentation. It
12 is quite a bit more doubtful that Plaintiff in good faith
13 can allege that Wendy Little committed the same category of
14 wrongdoing.

15 Conversion. Like the claim for fraudulent
16 misrepresentation, Plaintiff's conversion claim fails
17 because Plaintiff does not allege that Wendy Little acted
18 with the requisite scienter. To state a claim for
19 conversion, a Plaintiff must allege that the Defendant
20 interfered with its property interest without lawful
21 justification. That is a part of the affirmative claim.

22 Here, Plaintiff alleges that Wells Fargo
23 interfered with plaintiffs' property interest when Wells
24 Fargo wire transferred funds from Plaintiff's IOLTA account
25 to China. But, Plaintiff also alleges that Wells Fargo made

1 the wire transfer at Plaintiff's own instruction. This
2 means that the Complaint, itself, alleges that Wells Fargo
3 had lawful justification for making the wire transfer. The
4 only way around that hurdle for Plaintiff, here, is to
5 allege that Wells Fargo induced that instruction through
6 duress or fraud.

7 The law is clear on that point, and we have cited
8 it, I believe, in our Reply Brief.

9 Again, Plaintiff does not allege that anybody at
10 Wells Fargo used fraud or duress to obtain Plaintiff's
11 instruction to make the wire transfer. And for that reason,
12 Plaintiffs failed to state a claim for conversion, given the
13 fact that, as they alleged, they instructed Wells Fargo to
14 make this wire transfer.

15 The Deceptive Trade Practices Act. There are
16 several reasons the Complaint fails to state a claim under
17 Minnesota Deceptive Trade Practices Act. I will focus on
18 just one.

19 The statute provides for only injunctive relief
20 and nothing else. Minnesota's Private Attorney General
21 Statute, which allows a private plaintiff to bring a claim
22 for damages under certain laws listed in the Private
23 Attorney General's Statute does not apply to the Deceptive
24 Trade Practices Act because the Trade Practices Act is not
25 one of those listed laws.

1 So, the only relief allowed under the Minnesota
2 Deceptive Trade Practices Act is injunctive relief; that is
3 clear. Because the Deceptive Trade Practices Act allows
4 only injunctive relief, a complaint fails to state a claim
5 under that Act unless it states a claim for injunctive
6 relief.

7 A mere demand for unspecified injunctive relief,
8 which is what you find in the Plaintiff's First Amended
9 Complaint is not enough. You have to allege the existence
10 of prospective conduct that creates the threat of future
11 injury.

12 Injunctions don't remedy past injuries, they
13 remedy the threat of future injury. And that is why you
14 have to allege that there is conduct ongoing, or prospective
15 conduct that creates that threat.

16 Plaintiff's Complaint does not allege that Wells
17 Fargo is currently engaged in or is about to engage in any
18 conduct that creates the threat of future injury.
19 Consequently, Plaintiff fails to state a claim under
20 Minnesota's Deceptive Trade Practices Act.

21 Now, dismissal of these three counts, along with
22 the other counts that Plaintiff agrees should be dismissed
23 still leaves Plaintiff with plenty of claims against Wells
24 Fargo, here. By my tally, Plaintiff still has seven
25 separate counts against Wells Fargo, including negligence,

1 negligent misrepresentation, breach of fiduciary duty,
2 breach of some special duty, and violation of Article 4 of
3 the Uniform Commercial Code. But, the law is very clear
4 that Plaintiff fails to allege the necessary factual
5 elements of claims for fraudulent misrepresentation,
6 conversion, and injunctive relief under the Deceptive Trade
7 Practices Act. And these three counts therefore must be
8 dismissed as a matter of law.

9 If I may, Your Honor, I will save my remaining
10 time for rebuttal.

11 THE COURT: Okay, all right. All right, on behalf
12 of Plaintiff?

13 MR. DOCHERTY: Thank you, Your Honor. Again,
14 Michael Docherty representing the law firm of Milavetz,
15 Gallop & Milavetz. Wells Fargo has argued with respect to
16 the fraud claim that we've failed to allege the requisite
17 intent, or as counsel referred to, as scienter.

18 I think it is important in this motion to keep in
19 mind that in a Rule 12 Motion, all of the facts must be
20 construed in favor of the Plaintiff, as we know; but, not
21 only the facts, but all reasonable inferences from those
22 facts must be construed in the Plaintiff's favor. The issue
23 here is the knowledge requirement, including fraud. And
24 counsel indicated or argued that nowhere in our Complaint do
25 we allege the requisite scienter by Wendy Little.

1 We don't dispute with Wells Fargo that the
2 requisite intent has to be that of Wendy Little. We are not
3 arguing, we have not in our brief for any kind of collective
4 or corporate scienter. But I would refer the Court to
5 paragraph 6 of the Amended Complaint, which states, quote,
6 "Prior to the wire transfer, Wells Fargo falsely represented
7 to MGM the fraudulent check, Exhibit A, had cleared, and
8 issued the outgoing wire transfer, even though Wells Fargo
9 and their customer service representatives working with MGM
10 knew or should have known that the cashier's check was
11 fraudulent."

12 Now, the customer service representatives working
13 with MGM are identified elsewhere in the Complaint as Wendy
14 Little and another person at the bank. So, we have in fact
15 alleged that Wendy Little knew or in the alternative should
16 have known of the falsity of her statement.

17 Now, the cases make clear, as counsel for the Bank
18 agrees, that it is not necessary to show knowledge that the
19 statement is false in order to state a claim for fraudulent
20 misrepresentation. It is sufficient to show that the
21 representer made the statement not knowing whether it was
22 true or false or knowing that the information she relied
23 upon was not adequate to make the unqualified assertion
24 being made.

25 The Complaint alleges that the Bank, Wells Fargo,

1 collectively knew days before the misrepresentation that
2 Wendy -- I'm sorry, that the check had been returned. And
3 again, we are not arguing any kind of collective knowledge
4 or collective intent.

5 The statement at issue is the statement by Wendy
6 Little, the individual customer service representative, that
7 the check had cleared. And I would submit to the Court that
8 that statement, making a statement like that implies that
9 you have checked something. There is the reasonable
10 inference that the Court can draw that in that statement is
11 the clear implication that you have checked something.

12 I would make the analogy of going to the Post
13 Office and asking the clerk, has my package arrived? If the
14 clerk answers that question, either way, there is a clear
15 implication in that answer that they have checked something.

16 And I think the same reasoning applies to this
17 question: Has the check cleared? Yes, it has. There is a
18 clear implication and a clear inference that should be drawn
19 in the Plaintiff's favor that the representer is saying that
20 she has checked.

21 Now, because Wells Fargo had the knowledge, the
22 importance of that, again, is not to argue any kind of
23 collective intent. The fact that Wells Fargo had the
24 knowledge in its database indicates that Wendy Little must
25 not have checked. She made the statement, she -- we know

1 she didn't check, so she clearly made the statement knowing
2 that she didn't have adequate information to make the
3 unqualified assertion.

4 Wells Fargo argues in their brief, their reply
5 brief, that perhaps Wendy Little didn't check because she
6 mistakenly didn't think she had to. I would submit that
7 that is an inference from the facts which Wells Fargo is
8 asking this Court to draw in its favor. And I would suggest
9 or remind the Court that, again, those inferences have to be
10 drawn in favor of the Plaintiff.

11 The knowledge requirement here must also be viewed
12 in light of Wendy Little's e-mails to the law firm. There
13 are two of them with nearly identical language. One was
14 sent shortly after the other. In that e-mail she says,
15 quote, "We need to watch the account to be assured this
16 check has cleared the account." And then a little later in
17 the e-mail, "Once cleared, we will be able to process the
18 wire..." --

19 THE COURT: Remind me, is the e-mail referred to
20 in the Complaint?

21 MR. DOCHERTY: It is, Your Honor.

22 THE COURT: Okay.

23 MR. DOCHERTY: It is quoted, in fact both of them
24 are quoted the verbatim in the Complaint.

25 THE COURT: All right. Thank you. Go ahead.

1 MR. DOCHERTY: So, that e-mail is central to our
2 case, obviously, not only for these counts, but for the
3 other counts that are not being challenged here. So, again,
4 keeping that e-mail in mind, keeping in mind that the e-mail
5 was made to Jeanine Hanson, a paralegal at the law firm whom
6 Wendy Little had dealt before, the inference, the clear
7 inference there is again when she made the statement, when
8 the e-mail comes, the law firm says we will have to watch
9 the account to make sure this check clears. And then a few
10 days later someone from the law firm goes to the bank and
11 says to the person who sent the e-mail, has check cleared?
12 Again, that is further grounds for when she made the
13 statement, she was clearly implying that she had checked.
14 And she -- because we know Wells Fargo had the information,
15 we know that she must not have checked.

16 The conversion claim -- I will take these a little
17 bit out of order as counsel did.

18 THE COURT: Okay.

19 MR. DOCHERTY: Because it is somewhat related to
20 the fraud claim. Conversion is defined under Minnesota law
21 as an act of willful interference with the personal property
22 of another which is without justification or inconsistent
23 with the rights of the person entitled to use the property.

24 Now, in its brief, Wells Fargo refers to
25 conversion as an intentional tort. That is not necessarily

1 true. And I, too, am going to cite a couple of cases that
2 are not in our brief. And I apologize for doing that, but
3 like counsel, I have had a little time to work on this, too.

4 In *Farwell -- sorry, Hauser versus Farwell, Ozmun,*
5 *Kirk & Company* 299 F.Supp. 387, at page 395, that is a
6 District of Minnesota case from 1969. The Court says, "The
7 innocent misapplication or deprivation of funds owned by
8 others is in the law no less a conversion, because such was
9 done innocently or in ignorance."

10 Now, Wells Fargo in their brief argue that,
11 essentially, that the Plaintiff must show an unlawful
12 interference. Again, that is not necessary. It is
13 sufficient under the *Hauser* case and other cases that are
14 cited in *Hauser* that interference need not be lawful. It is
15 sufficient if it is without justification or inconsistent
16 with the rights of the owner.

17 Wells Fargo argues that because the law firm
18 authorized the transfer by signing the wire transfer after
19 the misrepresentation was made, that the interference could
20 not have been unlawful, could not have been unjustified. I
21 suggest that under that reasoning, anyone who converts
22 property through misrepresentation could avoid liability for
23 conversion, as long as they were able to convince the victim
24 to sign something. I don't think the law would support that
25 result.

1 Wells Fargo also argues in their brief that we
2 need to show duress or fraud to state a claim for
3 conversion. And they cite some cases that in fact rely on
4 duress or fraud to support the unjustified nature of the
5 interference in those cases. But, none of those cases say
6 that the plaintiff is limited to duress or fraud as the
7 basis for the unlawful nature of the interference.

8 And again, I would refer the Court to that *Hauser*
9 case that an innocent misapplication or innocent
10 interference with property rights can in fact justify a
11 claim of conversion.

12 We have also argued in our brief in response to
13 the Bank's argument that it doesn't matter that because this
14 was a trust account, the law firm didn't have ownership of
15 all of the funds in the account. It is clear under
16 Minnesota law that a bailee can make a claim for conversion.

17 Now, Wells Fargo responds to our -- responded to
18 our arguments on bailments in their reply brief by citing
19 the *Witmeyer* case out of Virginia. But, that case doesn't
20 really offer Wells Fargo any comfort. It doesn't address
21 the bailment argument that we have made. The plaintiff in
22 the *Witmeyer* case, also a lawyer, also the victim of a
23 Nigerian-type scam made a subrogation argument in that case.
24 And the Court spent some time dissecting and finally
25 rejecting that subrogation argument. But, that is a totally

1 different argument than the one we are making. We are not
2 arguing that the law firm has a subrogation right and is
3 asserting a subrogation right with respect to these funds.

4 We have argued in our brief that an attorney with
5 a trust account is in fact in a bailor/bailee relationship
6 with clients. Now, bailment is a pretty broad and fairly
7 simple concept under the law. If it is defined in Black's
8 Law Dictionary as a delivery of goods or personal property
9 by one person to another in trust for the execution of a
10 special object upon or in relation to the goods.

11 Under Minnesota law, and again I am going to cite
12 a case not cited in our brief, but it is an old case,
13 *Caldwell versus Metropolitan Airport Commission*, 386 N.W.2d
14 246, at page 247, a Court of Appeals case from 1986 defines
15 bailment or sets forth the elements of a bailment under
16 Minnesota law as follows. Number one, delivery without
17 transfer of ownership. Number two, implied or express
18 acceptance, and number three, an express or implied
19 agreement that the goods be returned. I submit that all of
20 those elements are present in the attorney-client law firm
21 trust account relationship.

22 Now, we have cited in our brief the *Brown versus*
23 *Shaw* case, a very old case in Minnesota. We have also cited
24 some more recent ones. But, it has long been the law in
25 Minnesota that a bailee may maintain an action for

1 conversion. And the fact that ownership was in a person
2 other than the bailee is no defense to a claim of
3 conversion.

4 Finally, the Deceptive Trade Practices Act, I will
5 spend only a few moments on this, Your Honor. We have
6 pleaded -- we have requested injunctive relief. We have
7 alleged future harm in the sense of a loss of business from
8 clients, that is in paragraph 219.

9 Because we submit there is a public benefit here,
10 possible injunctive relief could be for the public at large.
11 For example, Wells Fargo could send a notice to all
12 Minnesota attorneys with trust accounts warning them of this
13 type of scam or something like that.

14 On the public benefits aspect of that, the bank
15 has argued that there is no public benefit because no one
16 but the law firm here was injured. The *Collins versus*
17 *Minnesota School of Business* case makes clear that what
18 matters is the dissemination of the representations to the
19 public at large, not the number of people injured.

20 And I suggest that at the very least this count
21 requires some discovery before the Court considers a
22 dismissal to determine whether the representations were in
23 fact false as to other customers.

24 And that is all I have, Your Honor.

25 THE COURT: All right.

MR. DOCHERTY: Thank you very much.

THE COURT: Very good. Thank you. Brief reply?

MR. THOMSON: Thank you, Your Honor.

On the issue of scienter, I will try to address the points in the order that counsel made them. They refer to paragraph 6 of their Complaint. Paragraph 6 says, "Prior to the wire transfer, Wells Fargo falsely represented to MGM, the Milavetz Law Firm, that the fraudulent check had cleared and not issued the outgoing wire transfer even though Wells Fargo and their customer services representatives working with MGM knew or should have known that the cashier's check was fraudulent.

This allegation does not say that Wendy Little,
who is the person who made the alleged false representation
knew that the check was a fake check at the time she made
her representation. It says that Wells Fargo and unnamed
customer service representatives, in the plural, knew or
should have known.

19 That allegation fails Rule 9(b) when you are
20 talking about an allegation of fraud, because it lacks the
21 particularity to which the Defendant is entitled. Who is
22 the person, who are the people who actually knew this, if
23 they knew it at all?

If the Milavetz Law Firm wants to make the
allegation that Wendy Little actually knew at the time she

1 made her representation that the check had cleared, that in
2 fact the check had not cleared and had been returned, then
3 let the Milavetz Law Firm in compliance with Rule 11, if
4 they have a good faith basis to do so, make that allegation
5 so that Wells Fargo, then, if there is discovery on that
6 claim and if they do make that claim, can seek its remedies
7 under Rule 11 and can also argue to the jury that the
8 Milavetz Law Firm was willing to make that allegation after
9 the jury hears the evidence in this case. Wells Fargo is
10 entitled to that specificity under Rule 9(b).

11 In addition, counsel argues that Wendy Little's
12 statements implied that she had checked into Wells Fargo's
13 records. The implications of Wendy Little's statements are
14 not the issue, here. The issue here is what was in Wendy
15 Little's subjective state of mind if she made implications
16 that she knew not she was making. Or, if she even made
17 implications but was checking different records, that is
18 okay. That is not an allegation of scienter.

19 They have to make the allegations
20 straightforwardly and with the specificity required by Rule
21 9 that Wendy Little actually knew that she was lying, or
22 actually knew that she didn't know whether or not she was
23 telling the truth but went ahead and said it, anyway. They
24 don't make that allegation. And fraud is a serious matter
25 to allege, especially against a bank. If they are going to

1 make that allegation, they have got to make it according to
2 Rule 9 with the specificity that the Rules require.

3 They talk about the e-mail that is referred to in
4 the Complaint. And the Court can see this when the Court
5 reviews the Complaint. That e-mail says something to the
6 effect of: We need to watch this account. That e-mail was
7 sent before the alleged misrepresentation was made.

8 The fact that she says we need to watch this
9 account is not a statement that I did look at this account,
10 when in fact she didn't look at the account. Or, that I
11 looked at the part of the account that would have told me
12 the truth, rather than another record that didn't tell me
13 the truth.

14 Again, the fact that she sent that e-mail prior to
15 the misrepresentation that is alleged here does not allege
16 that she had the requisite scienter when in fact she made
17 the representation that is alleged here.

18 And again, the Milavetz Law Firm either has to
19 step up to the plate and make the allegation that she had
20 the alleged scienter, or it has to back away from this
21 claim.

22 On conversion. Counsel says that it is okay if
23 the conversion is innocent and he seems to think that means
24 that this is not an intentional tort. It is still an
25 intentional tort. You have to intend to take the property.

1 But, you can do so innocently. And it does not have to be
2 an unlawful taking. There doesn't have to be any violation
3 of the criminal code or anything like that. That is fine.
4 But, the one element, and counsel read this, and when he was
5 reading the law that he is overlooking is that the taking
6 has to be, quote, "without justification," closed quote.

7 The justification here, as alleged in the
8 Complaint, is that Milavetz Law Firm instructed Wells Fargo,
9 make this wire transfer. Wells Fargo would have been guilty
10 of conversion if it hadn't made the wire transfer.

11 They say, if a defendant is able to convince the
12 plaintiff to sign something, then the defendant can get away
13 with conversion. That is not at all what the cases say.
14 That is not at all what Wells Fargo is arguing here.

15 If Wells Fargo convinced through fraud, trickery,
16 duress, any of the devices that the cases and the
17 Restatements say will override a property owner's consent,
18 if Wells Fargo used those tactics to convince, then Wells
19 Fargo would have been guilty of fraud or duress. And under
20 the Restatement, under the case law, Wells Fargo would then
21 not be justified in relying on the Plaintiff's instruction
22 because Wells Fargo would wrongfully have induced that
23 instruction. But merely negligently making a representation
24 which may have induced the instruction does not give Wells
25 Fargo any reason to not rely on the instruction. It is only

1 if you know that you have tricked somebody into making an
2 instruction that you are not justified in relying on it.

3 Now, counsel makes arguments about bailment that
4 have nothing to do with this issue of justifiable reliance.
5 They have to do with a different reason for dismissing this
6 Complaint or this claim.

7 The different reason is that the Milavetz Law Firm
8 did not own these funds at the time of the alleged
9 conversion. The conversion claim actually belongs to the
10 owners of those funds who were the clients of the Milavetz
11 Law Firm. That is a different argument from the justifiable
12 sending of the monies. But, nevertheless, the argument is
13 still wrong.

14 They say that this was a bailment. It may have
15 been a bailment. That doesn't give the Milavetz Law Firm
16 ownership of those funds unless the Milavetz Law Firm is
17 subrogated to the rights of the true owners of those funds.
18 In other words, they don't have the right to claim that
19 there was a conversion here unless they are subrogated to
20 the rights of the true owner. The bailee has the right to
21 sue for conversion, only because the bailee is subrogated to
22 the rights of the bailors.

23 So, although counsel says that they don't have to
24 show subrogation, in fact they do. Because without
25 subrogation, there just is no claim to assert the rights of

1 the true owners of the property.

2 And for the reasoning set forth in that Virginia
3 case, which I think is very eloquent, the lawyers cannot
4 claim that they have the right to sue on behalf of the
5 people whom the lawyers, themselves, have let down by not
6 watching their trust funds with adequate security.

7 On the Deceptive Trade Practices Act, they say
8 they have requested injunctive relief. If you look at the
9 Complaint, there is just a boilerplate recitation, we want
10 injunctive relief. They don't say what injunction they
11 want. That, in itself, is sufficient to dismiss the
12 Deceptive Trade Practices Act claim.

13 Again, Milavetz Law Firm, if they can, can try to
14 rectify that problem through an Amended Complaint. They
15 say, well, they have alleged future harm because there is
16 the possibility that there could be a loss of the business
17 of clients in the future.

18 They don't tie that to anything that Wells Fargo
19 is currently doing or is currently threatening to do.
20 Again, they have to show that Wells Fargo is doing something
21 or about to do something that creates an immediate threat of
22 future harm that has to be repaired through an injunction.

23 We don't need to get to the question of whether
24 there is a public benefit here. And the reason we don't is
25 that it is now perfectly clear that the Deceptive Trade

1 Practices Act authorizes only injunctive relief, not
2 damages. But, being a lawyer, I have to cover everything,
3 and I hope you will forgive me.

4 I want to tell you that there is no public benefit
5 that is alleged here. Counsel says, well, maybe if we did
6 discovery we could find some public benefit. That is not
7 how a pleading works. You have to have your Rule 11 basis
8 at the time you make the pleading. You don't make a claim
9 and then go fishing for facts that might justify the
10 pleading.

11 Rule 11 says you have a good faith basis at the
12 time you make the Complaint. And if you look at the
13 Complaint, here, the representation that is made is Wells
14 Fargo offers these products to people and these products
15 will protect you from fraud. And the Plaintiff says, well,
16 they didn't offer that product to us, they didn't give that
17 product to us. That is essentially a breach of contract, a
18 breach of promise allegation. There is no allegation in the
19 Complaint that Wells Fargo failed to give this product to
20 anybody else to whom it was offered, until the Milavetz Law
21 Firm steps up to the plate under Rule 11 and makes the
22 allegation that Wells Fargo made this blanket representation
23 to the world and fulfilled it as to -- or failed to fulfill
24 it for more than one person. They don't state any public
25 benefit. It is just a private breach of promise claim. So,

1 there is no public benefit here, either.

2 But, the simplest route to dismissal of this claim
3 is, they have no claim for injunctive relief because they
4 don't allege any present conduct by Wells Fargo that
5 threatens future harm. And on the other two claims,
6 conversion and fraudulent misrepresentation, they do not
7 allege that when Wendy Little actually knew at the time she
8 was making the representation that it was false, or actually
9 knew at the time she was making the representation that she
10 didn't know whether it was true or false, but went ahead and
11 made the representation, anyway.

12 Fraudulent misrepresentation requires a certain
13 level of good old American evil that you know in your heart
14 that what you are doing isn't quite right. They don't make
15 that allegation here.

16 THE COURT: Okay. All right, thank you. Well, I
17 will take it under advisement, as I must. So, I will issue
18 an R & R. And then you folks will have an opportunity to
19 make any objections that you would like to bring to the
20 Chief's attention. And he will look it over. All right?

21 MR. DOCHERTY: Thank you.

22 THE COURT: And I haven't seen you folks yet,
23 right? On the Rule 16 or anything? This was your first --

24 MR. DOCHERTY: That is correct, Your Honor.

25 MR. THOMSON: That is correct.

1 THE COURT: Is this how you responded to the --

2 MR. THOMSON: Exactly.

3 THE COURT: All right, then, normally I talk to
4 people about, of course, trying to figure out a way to
5 resolve matters, but it might be best if I just focused on
6 this part first and we will see where we are at. And then I
7 will encourage you to try to get it resolved. All right?

8 Very good, we will be in recess. Thank you.

9 MR. THOMSON: Thank you, Your Honor.

10 MR. DOCHERTY: Thank you, Your Honor.

11 (Adjournment.)

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2 CERTIFICATE
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56 The foregoing transcript is a
7 transcription of the digital audio recording that was
8 produced in the above matter by Court staff and later
9 submitted to myself, Jeanne M. Anderson, for transcription.
10 An official court reporter was not present to produce a
11 stenographic and verbatim record of the aforementioned
12 proceeding at the time and place specified herein.

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16 Certified by: s/ Jeanne M. Anderson

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Jeanne M. Anderson, RMR-RPR
18 Official Court Reporter

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